Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1472

* * *

MICHAEL EDWARD CHASE,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

* * *

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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RESPONDENT'S BRIEF IN OPPOSITION

* * *

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Respondent herein, and files this his Brief in Opposition.

QUESTIONS PRESENTED

I. Whether there exists a constitutional right to be heard at oral argument on a federal habeas appeal pursuant to a state court conviction.

II. Whether this Court should commence the unprecedented separate review of the summary nature of dispositions by the Court of Appeals under an abuse of discretion standard.

III. Whether the court below was correct in summarily affirming the district court's denial of the application for writ of habeas corpus.

A. Whether there is a factual issue in this case which needs to be determined.

B. Whether the photographs which were introduced into evidence were legally obtained.

C. Whether Petitioner's confession was still admissible into evidence, even if the photographs were obtained illegally.

D. Whether the admission into evidence of the photographs was harmless error beyond a reasonable doubt.

E. Whether an evidentiary hearing was warranted.

STATUTES INVOLVED

TEX. CODE CRIM. PROC. ANN. art. 38.22 (1965):

"1. The oral or written confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible if:

* * *

(e) It be made orally and the defendant makes a statement of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed."

5th Cir. R. 21, 28 U.S.C. (Supp. 1976):

"When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.' "

STATEMENT OF THE CASE

Michael Edward Chase, Petitioner herein, was convicted of murder with malice and sentenced to life imprisonment in Criminal District Court No. 3, Dallas County, Texas.

During the trial, the State introduced into evidence the oral confession of the Petitioner and photographs

obtained during a search of Petitioner's residence pursuant to a search warrant issued on October 7, 1970. Petitioner moved to suppress the photographs obtained from the search, alleging that the warrant was obtained as a result of a ruse and that the search exceeded the scope of the warrant in that it was an exploratory search for evidence rather than for an instrumentality of the crime. The trial court held an evidentiary hearing on the validity of the warrant and the conduct of the search and denied Petitioner's Motion to Suppress. Petitioner also objected to the admission of the confession on the ground that it was explanatory but did not lead to any of the instrumentalities of the crime. This objection was also overruled by the trial court.

These issues were raised on appeal to the Texas Court of Criminal Appeals. All points of error were dismissed and the judgment was affirmed. *Chase v. State*, 508 S.W.2d 605 (Tex.Crim. App. 1974). This Court subsequently denied a petition for writ of certiorari. 419 U.S. 840 (1974).

Petitioner next filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas on October 18, 1974, challenging the admission into evidence of the photographs and Petitioner's confession. That petition was denied on July 1, 1975.

Petitioner appealed the district court's order to the United States Court of Appeals for the Fifth Circuit. After thorough briefing of the issues by both sides, that Court summarily affirmed the order of the district court on February 2, 1976, pursuant to 5th Cir. R. 21, 28 U.S.C. (Supp. 1976); hereinafter referred to as Local Rule 21.

Petitioner then filed a Petition for Rehearing and

for Rehearing En Banc, which was denied on March 1, 1976.

STATEMENT OF FACTS

Petitioner, at the time of the offense, was a seventeen year old high school student, living with his parents in Dallas, Texas. On the night of August 21, 1970, Petitioner and the deceased attended a party together. The deceased was to spend the night with Petitioner and they left the party together. Petitioner's parents were away from home for the night. Petitioner gave a written statement that the deceased had been at his home that night.

On August 24, 1970, the body of the deceased was found on the bank of the Trinity River. The body was encased in a green sleeping bag with a large rope around it. There was a large piece of plywood over the body.

On September 10, 1970, a search was conducted of Petitioner's residence with the consent of his parents. A large rope was found and a small piece of it was taken by the police. Also taken was a bayonet and another knife. The officers also took numerous stain samples in the house from the rugs and their rubber pads, the bathroom door, and a bookshelf.

On September 14, 1970, an arrest warrant was issued for Petitioner and he was taken into custody. Following his arrest, and after being given the required *Miranda* warnings, Petitioner made an oral confession to officers. By this confession the officers first learned that the bayonet was the murder weapon, that the rope around the sleeping bag containing the body was cut from a rope located at the Petitioner's home, that the

plywood board found with the body was a suspended table top that came from Petitioner's younger brother's room, and that the sleeping bag in which the body was found belonged to a friend of Petitioner.

After arriving at the sheriff's office, Petitioner was arraigned before a judge and taken from there to an interview room where the oral confession continued. Petitioner stated that he and the deceased went to Petitioner's home after a party. He stated that he and the deceased were drunk and had gotten into an argument, but would not talk further about the incident surrounding the death of the deceased. He stated that he awakened the next morning and found the body of the deceased lying on the floor. He went to the carport and got the rope and sleeping bag, placed the body in the bag and dragged it to a tin shed behind the house. He later returned to the shed, placed the deceased in the bed of the pickup, covered the body with the plywood, and drove to the river. Upon arrival at the river, he placed the deceased on the plywood, dragged him to the water, placed the body in the water and covered it with the plywood. Petitioner further stated that he subsequently made extensive efforts to clean the blood stains from the carpets in the house. This confession was admitted into evidence at the trial.

On October 7, 1970, officers obtained a search warrant for the purpose of locating the additional piece of rope believed to be in the house. While executing this warrant, the officers also entered Petitioner's brother's room and attempted to fit the plywood board to screwholes which they found in the wall of said room. The board was a perfect match. The officers photographed the board in place and these photographs were also introduced into evidence.

SUMMARY OF ARGUMENT

In his instant Petition for Writ of Certiorari, Petitioner challenges only the summary nature of the affirmance by the United States Court of Appeals for the Fifth Circuit of the denial of his application for writ of habeas corpus by the United States District Court. Respondent would first urge the Court to refrain from engaging in such unprecedented review. Second, Respondent submits that Petitioner's rather unique constitutional contention, to wit, that he has a constitutional right to be heard at oral argument on a habeas corpus appeal under the Due Process Clause of the Fifth Amendment to the United States Constitution, is utterly frivolous. Petitioner's other argument is that the Fifth Circuit abused its discretion under Local Rule 21 by entering its judgment pursuant to the submission of briefs and without oral argument. As is evident from the instant Petition, the latter contention must necessarily be based upon the merits of Petitioner's case before the court below. Respondent, therefore, finds it necessary to delineate the arguments below so that this Court may fully understand the basis upon which oral argument was found to be unnecessary for decision.

Petitioner asserted in the court below that he was convicted pursuant to the admission of illegally obtained photographs, and that these photographs served as the only corroboration for the admission of his oral confession.

Respondent replied that the photographs were admissible into evidence because they were the result of a legally conducted search, reflecting only what was in the plain view of the officers. Moreover, even assuming for the purpose of argument that the photographs were inadmissible, Petitioner's confession was still admissible into evidence. First, there is no

constitutional objection whatsoever to the admission of Petitioner's oral confession, its admissibility turning entirely upon a question of state law under Article 38.22 §1(e) of the Texas Code of Criminal Procedure. Second, the purely *state law* requirement of corroboration under the foregoing statute was satisfied by an abundance of evidence independent of the photographs. In sum, given the admissibility of Petitioner's confession plus the presentation of other overwhelming evidence of guilt to the jury, the introduction of the allegedly inadmissible photographs was, at most, harmless error beyond a reasonable doubt.

Respondent submits that this Court should not review the Fifth Circuit's conclusion that the record and arguments before it warranted summary affirmance without the necessity for oral argument.

ARGUMENT AND AUTHORITIES

I. There Is No Constitutional Right To Be Heard At Oral Argument On A Federal Habeas Appeal Pursuant To A State Court Conviction.

Petitioner's assertion in this regard is utterly frivolous. None of the cases he cites are apposite to a federal habeas appeal pursuant to a state court conviction,[1] while the articles cited discuss matters of judicial policy, not constitutional commandment.

It is simply incredible that a person who has been tried and convicted by a jury of his peers, who then had plenary review of those proceedings by the highest court

[1]Indeed, even his assertion that 28 U.S.C. §2253 provides appellate review as a matter of right in such a case is contradicted by the statute on its face, with its prerequisite of a certificate of probable cause to appeal.

of the state, who next petitioned this Court for immediate relief and was denied, who again obtained review of his contentions by a federal district court, and who subsequently obtained review by means of an extensive written brief[2] before the federal appellate court, would assert that his constitutional rights were denied because the latter court did not grant him oral argument (or the "benefit" of a detailed written opinion)! No matter how far our society might be willing to go to satisfy a convicted murderer who does not even challenge an error related to his guilt, surely the Constitution does not go this far.

Finally, when this Court has held that there is no constitutional right to an appeal from a state court conviction, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) then, *a fortiori*, there is no constitutional right to be heard by means of oral argument on a federal habeas appeal of the same conviction. Furthermore, if there be such a constitutional right, then surely it exists as well in this Court.

II. This Court Should Not Commence The Unprecedented Separate Review Of The Summary Nature of Dispositions By The Courts Of Appeals Under An Abuse Of Discretion Standard.

Petitioner would have this Court embark on a new era of reviewing summary affirmances on *two* occasions; first, when the summary disposition occurs under an abuse of discretion standard and, second, when the case is affirmed upon remand by means of a written opinion pursuant to oral argument below. Not only

[2]Contrary to Petitioner's contentions, he was "heard" in the Fifth Circuit though he was not "heard" orally.

would such a procedure impose a heavy burden upon this Court, but it is also a complete waste of valuable judicial resources, given the necessity of reviewing the merits on *both* occasions. As is evident from the arguments presented in the instant Petition, this Court will inevitably need to review the merits of the controversy when a Petitioner, as here, challenges only the summary nature of the disposition below under an abuse of discretion standard.

It would be much more expeditious if this Petitioner had raised, and if every other Petitioner would as heretofore be required to raise, his contentions on the merits rather than the procedural issue presented here.

III. The Court Below Was Correct In Summarily Affirming The District Court's Denial Of The Application For Writ Of Habeas Corpus.

In the event that this Court should choose to review the summary nature of the affirmance by the court below, Respondent finds it necessary to delineate the argument below; first, because the alleged abuse of discretion in so acting must be based upon the merits of Petitioner's case before the court and, second, so that this Court may fully understand the basis upon which oral argument (in addition to briefing) was found to be unnecessary for decision.

A. Contrary to the implications raised by the Petition, there is not and there has not been a factual issue in this case.

By implication, Petitioner attempts to raise an issue as to whether the police officers were using the search warrant as a ruse to accomplish an exploratory search of the premises. (Petition at 10-11, 13).

That issue was previously raised by Petitioner's "Motion To Suppress Evidence i.e. Search Warrant" filed prior to his state court trial. (Record on Appeal in the Fifth Circuit, 28-29; hereinafter cited as R.O.A. ___). The state trial court held an evidentiary hearing on this Motion during the trial and outside the presence of the jury. (Statement of Facts, 476-493; hereinafter cited as S.F. ___). Defense counsel, on cross-examination of Officer Williamson at this hearing, attempted to establish that the search warrant was used in the manner alleged by Petitioner in this Court. (S.F. 481-482). The trial court's Findings of Fact and Conclusions of Law implicitly rejected this assertion. (R.O.A. 30-31).

Most importantly, Petitioner admitted in the Fifth Circuit that it is immaterial whether the officers intended to use the search warrant as a ruse. (Petitioner's Fifth Circuit Brief, 7). He previously made an identical admission in his Reply to Respondent's Motion to Dismiss and Answer in the United States District Court. (R.O.A. 32).

In sum, the only issues actually raised by Petitioner throughout the federal court proceedings are questions of law.

B. The photographs were obtained legally.

The officers were on the premises pursuant to a valid search warrant. The taking of the photographs did not constitute a search beyond the scope of the warrant because they reflected what the officers were able to observe at the scene in plain view. *Ker v. California*, 374 U.S. 23 (1963); *Fisher v. State*, 291 N.E.2d 76 (Indiana, 1973); *Tocher v. State*, 501 S.W.2d 921 (Tex.Crim.App. 1973). It is clear from the testimony presented at the evidentiary hearing held outside of the presence of the jury that the police officers did not use the search

warrant as a ruse to obtain said plain view. (S.F. 481-482). Indeed, no such issue was raised in the court below or the district court.

C. Even if the photographs were obtained illegally, Petitioner's confession was admissible into evidence.

Petitioner correctly asserted on page 2 of his Fifth Circuit brief that the admission of the oral confession turned on a construction of Article 38.22, §1(e) of the Texas Code of Criminal Procedure, which provides:

> "1. The oral or written confession of a defendant made while the defendant was in . . . the custody of an officer shall be admissible if:
>
> * * *
>
> (e) It be made orally and the defendant makes a statement of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed."

It must be made perfectly clear that the admissibility of Petitioner's oral confession was and is purely a question of state law. There is no constitutional objection to the admission of an oral confession made subsequent to the administration of the *Miranda* warnings as was the case here. The Texas legislature merely added the above statutory requirements to the existing constitutional prerequisites.

An examination of the manner in which this confession was obtained will show no constitutional

deficiencies. Petitioner was under lawful arrest at the time of the confession. He had been read the required *Miranda* warnings and stated that he understood them. There is no allegation that the confession was in any way coerced or induced by trickery. The only question on admissibility of the confession is the *state law* requirement that it be independently corroborated by other evidence.

The federal courts only have jurisdiction over this matter if it involves a violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. §2254. The interpretation of Article 38.22 is purely a matter of state law, and the Texas Court of Criminal Appeals is the final arbiter in determining the existence of the additional requirements imposed there, the federal courts being bound by that determination.

This statute has been liberally construed by the Court of Criminal Appeals, especially in defining the requirement of "facts or circumstances that are found to be true." The words "such as" found in Subsection (e) of Article 38.22 are illustrative only and are not limitations on statements which conduce to establish guilt and are found to be true. *Valtiero v. State*, 219 S.W.2d 73 (Tex.Crim.App. 1949). Thus:

> "[F]acts and circumstances may be stated by an accused which unquestionably are inculpatory and conduce to establish his guilt, and yet neither lead to the recovery of stolen property, or the instruments with which the offense was committed." *Ashley v. State*, 363 S.W.2d 847 (Tex.Crim.App. 1962), *cert. denied*, 372 U.S. 956 (1963).

Thus the court has held that when the statement of the accused had led to the discovery of items *or information*

not previously discovered by the State, the "found to be true" requirement of TEX. CODE. CRIM. PROC. art. 38.22, §1, has been satisfied. *Wilson v. State*, 473 S.W.2d 532 (Tex.Crim.App. 1971); *Ashley v. State*, 362 S.W.2d 847 (Tex.Crim.App. 1962); *Stelman v. State*, 58 S.W.2d 831 (Tex.Crim.App. 1933). In sum, under Texas law, an oral confession is inadmissible only when it discloses no new information to the officers. *Taggart v. State*, 191 S.W.2d 728 (Tex.Crim.App. 1946).

In the present case, the confession revealed a wealth of new information to the officers. In addition to the origin of the plywood board, Petitioner's confession informed the officers for the first time of the source of the rope found with the body, of the origin of the sleeping bag, and of the use of the bayonet as the murder weapon. (S.F. 459-460, 585). In his confession, Petitioner stated that the rope found with the body came from his carport. (S.F. 525, 534). The piece of rope found with the body and the piece obtained from Petitioner's carport were both determined to have been made from the sisal plant. (S.F. 717). Petitioner also confessed that the sleeping bag in which the body was found belonged to Mr. Santoscoy. (S.F. 526, 534). The sleeping bag in which the body was found was determined to have a tag and price identical to the sleeping bag Petitioner had borrowed from Mr. Santoscoy. (S.F. 619-24). Petitioner also confessed that he killed the deceased with the bayonet. (S.F. 525). That bayonet was determined to have blood on it. (S.F. 712, 719). Moreover, it was determined to be compatible with the instrument that caused the injuries inflicted upon the deceased. (S.F. 734-735).

Thus, Petitioner's confession was independently corroborated by facts other than the photographs. Moreover, if but one stated fact is inculpatory and found to be true, the whole confession will be admissible. *Stelman v. State*, 58 S.W.2d 831 (Tex.Crim.App. 1933).

Therefore, the Court of Criminal Appeals had no occasion to delve into the additional corroborative facts since the photographs by themselves clearly served this purpose. Independent of the photographs, these additional facts alone "conduced to establish his guilt" and rendered his oral confession admissible under state law.

In conclusion, the admissibility of the oral confession is purely a question of state law since all constitutional requirements were satisfied. Petitioner's confession was corroborated by facts, independent of the photographs, which rendered his confession admissible under state law.

D. The admission into evidence of the photographs was harmless error beyond a reasonable doubt.

Even if the photographs were illegally obtained, their admission into evidence was harmless error beyond a reasonable doubt. The test is whether there is a "reasonable possibility" that the photographs might have contributed to Petitioner's conviction. *Chapman v. California*, 386 U.S. 18, 23 (1967). Two later cases have helped to define the constitutional harmless error rule. In *Harrington v. California*, 395 U.S. 250 (1969), this Court found that a violation of the right to confront witnesses against the accused was harmless error due to the overwhelming nature of the evidence against him. Similarly, in *Schneble v. Florida*, 405 U.S. 427 (1972), this Court held another violation of the Sixth Amendment to be harmless error, concluding "that the minds of the average jury would not have found the State's case significantly less persuasive had the testimony . . . been excluded." 405 U.S. at 432.

Consider the overwhelming evidence of Petitioner's guilt which was presented to the jury. First, the jury properly had before them (see Section III C, *supra*) Petitioner's confession to the murder, which included a detailed description of his attempt to cover up his actions. (S.F. 525-536). Second, numerous stain samples from the rugs and their rubber pads, the bathroom door, and the book shelf in Petitioner's house were introduced into evidence. (S.F. 677-687). The jury was presented with uncontradicted expert testimony that many of these stains consisted of human blood, group "O". (S.F. 705-712, 718). Moreover, uncontradicted testimony of another expert witness informed the jury that the deceased had blood group "O". (S.F. 738). Third, mud samples of foot prints from the river bank where the body was found and from the edge of the curb in front of Petitioner's house were introduced into evidence. (S.F. 374-378). The jury was presented with uncontradicted expert testimony that these mud samples had a common origin. (S.F. 700-705). Fourth, the evidence delineated heretofore with respect to the origin of the rope found with the body, the source of the sleeping bag in which the body was found, and the use of Petitioner's bayonet as the murder weapon was placed before the jury. Additional corroboration of Petitioner's confession before the jury was the uncontradicted testimony of an expert witness that the time of the deceased's death was compatible with the time related in Petitioner's confession. (S.F. 739). Moreover, Petitioner had stated that he stuffed sheets and blankets in the sleeping bag containing the deceased's body. (S.F. 534). The evidence showed that such items were found in the sleeping bag. (S.F. 354). Taken together, this evidence of Petitioner's guilt was overwhelming. In comparison, the effect of the admission into evidence of the photographs was *de minimis*.

Clearly, there is no "reasonable possibility" that the

photographs might have contributed to Petitioner's conviction. A holding to the contrary would completely destroy the harmless error rule. In sum, the admission into evidence of the allegedly illegally obtained photographs was harmless error beyond a reasonable doubt.

E. An evidentiary hearing was not warranted.

Respondent submits that there was no reason for the Fifth Circuit to remand for an evidentiary hearing in the federal district court. Of the two substantive issues presented, one was purely a question of state law, and the other was a question of federal law under the harmless error doctrine. Petitioner attempts to present a peripheral factual issue pertaining to the reason the officers secured the search warrant. As heretofore delineated, that issue was litigated in the trial court and decided adversely to Petitioner. Moreover, Petitioner has twice stated that such issue is immaterial to this cause. (Section III A, *supra*). However, even if Petitioner could present conclusive new evidence to support his allegation concerning the use of the search warrant, relief would still be denied pursuant to Sections III C and III D above.

In sum, Respondent submits that the United States Court of Appeals legitimately concluded on the basis of the record and written argument[3] before the court that the district court was correct in denying Petitioner's application for writ of habeas corpus, and that an opinion in regard to the well-established harmless error doctrine would have no precedential value. Thus, the

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[3]Indeed, the appellate judges had the benefit of two sets of extensive briefs, since the petition for writ of habeas corpus and the answer thereto in the district court were directed solely to the same issues of law.

Fifth Circuit was well within its descretion in invoking Local Rule 21. *See N.L.R.B. v. Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe B. Dibrell, Jr., Assistant Attorney General of Texas and a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Brief for Respondent have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the _____ day of

June, 1976, addressed to:

Mr. Emmett Colvin and
Mr. Gary Jackson
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1100 Adolphus Tower
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JOE B. DIBRELL, JR.
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